

Sexual Harassment and Abusive Behavior Training Requirements Expand Significantly

By Steve Marmaduke, Esq.

Commencing in 2015, California employers with 50 or more employees were required to provide two hours of training to supervisory employees focusing on the prevention of sexual harassment and abusive conduct. With the enactment of Senate Bill 1343 (Government Code Section 12950.1), California has expanded these training requirements effective January 1, 2019. The new law and supporting regulations provide that employers with five or more employees now have an affirmative obligation to provide training and education regarding sexual harassment and workplace conduct to both supervisors and non-supervisory employees. Specifically, commencing in 2019, employers must provide two hours of training for supervisors and one hour of training for non-supervisory employees every two years.

Applies to Employers of Five or More Employees

A threshold of questions for a small business is what constitutes “five or more employees.” The definition of employee includes full-time, part-time, and temporary workers. Further, the employee count includes others providing services to the employer under contract, which includes independent contractors. The law does not exclude owners of professional corporations who are also employees of such corporation from the employee count. Thus, it is reasonable to assume that these owners are included in the employee count, particularly if they have supervisory responsibilities.



Training Timetable and Cycles

The statutory scheme requires that the training be completed by January 1, 2020 and on an every other year cycle thereafter. Even if an employer provided supervisory training in 2018, they will need to provide training for employees in 2019. The next training cycle will be in 2021, as it must be completed by January 1, 2022. As employees come and go, however, employers may have to provide training on a more frequent basis. For instance, any employee appointed to a supervisory status must be trained within six months of such appointment, whether he or she was an existing employee or a new hire. Even if less than two years has expired since the newly appointed supervisor has received his or her training before the employer’s two-year training period, that supervisor must undergo training again to become synchronized with the employer’s two-year cycle. Beginning January 1, 2020, seasonal and temporary employees, or any employee that is hired to work for less than six months, shall be provided training within the earlier of six months or 100 hours worked.

Tracking Compliance

The employer has the obligation to track compliance. The employer may wish to issue certificates of completion but is not required to do so. Employers must, however, maintain documentation of training provided to its employees for a minimum of two years. This documentation should include the names of the supervisors and employees trained, the date of training, the sign-in sheet, a copy of all certificates of attendance or completion issued, the type of training, a copy of all written or recorded materials comprising the training, and the name of the training provider.

Training Objectives

The learning objectives for the training sessions as mandated by the regulations are: (1) to assist California employers in changing or modifying workplace behaviors that create or contribute to sexual harassment; (2) to provide trainees with information relating to the negative effects of abusive conduct in the workplace; and (3) to develop, foster, and encourage a set of values among supervisory employees that will assist them in preventing and effectively responding to incidents of sexual harassment, and to properly address and correct wrongful behavior (which is not defined). The regulations further set forth specific topics that

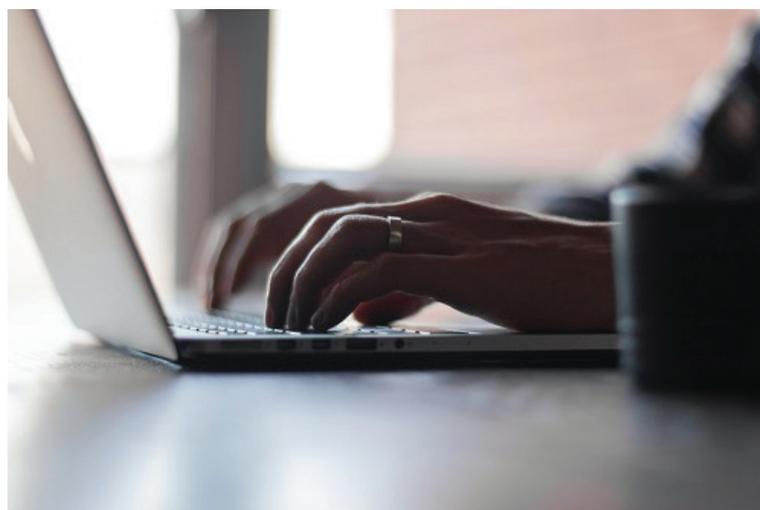
must be included in the training, which include:

1. The definition of unlawful sexual harassment under the Fair Employment and Housing Act (FEHA) and Title VII of the Federal Civil Rights Act of 1960 (Title VII).
2. FEHA and Title VII statutory provisions and case law principles concerning the prohibition and the prevention of unlawful sexual harassment, discrimination, and retaliation in employment.
3. The type of conduct that constitutes sexual harassment.
4. Remedies available to sexual harassment victims in civil actions and potential employer/individual exposure to liability.
5. Strategies to prevent sexual harassment in the workplace.
6. The supervisor's obligation to report sexual harassment, discrimination, and retaliation.
7. Practical examples and hypotheticals which illustrate sexual harassment, discrimination, and retaliation.
8. The limited confidentiality of the complaint process.
9. Resources for victims of unlawful sexual harassment and to whom employees should report alleged incidences.
10. Appropriate remedial actions to correct harassing behavior.
11. Training on what to do if a supervisor is accused of harassment.
12. Providing all supervisors with a copy of the employer's harassment policy.
13. A review of abusive conduct including discussions regarding conduct undertaken with malice that a reasonable person would find hostile and abusive, such as derogatory remarks, insults epithets, and the like.

The training on sexual harassment shall also include and address harassment based on gender identity, gender expression, and sexual orientation and provide specific examples. Finally, the training must have questions that assess learning, skill building activities to assess understanding and application of content, and hypothetical scenarios about harassment with questions.

Who can conduct the training?

Obviously, the content and scope of these training seminars is beyond the educational and experiential backgrounds of most veterinarians. In fact, the law requires that the training be conducted by qualified



trainers. Those eligible to be qualified trainers is limited to (1) attorneys with at least two years of membership with a state bar and whose practice includes employment law; (2) human resources professionals or harassment professional consultants with two years practical experiences in the areas of discrimination, retaliation, and sexual harassment; and (3) law school, college, or university instructors with postgraduate degrees or hold California teaching credentials and 20 hours of experience in instruction regarding employment law under FEHA or Title VII. Certainly many small employers, and even many larger businesses will lack the credentialed training personnel to lead these training sessions.

Training Methods

Although the training must be "effective interactive training," there is considerable flexibility as to the delivery method. It may be in a classroom environment, a webinar, or e-learning as long as there is an interactive element and trainees are free to ask questions. Interestingly, the required content for the one hour and the two hour sessions are the same, but the sessions can overlap. Given the extensive content requirements, it may be challenging to address all the required topics in a two-hour session let alone in one hour.

Overwhelmed? Packaged Products are Available

The California Department of Fair Employment and Housing (DFEH) will be required to develop a one-hour and a two-hour training course in accordance with the training and content requirements. Online training courses will be available on the DFEH website and shall contain interactive features which will require the viewers to respond to questions periodically in order for the online training courses to continue. As of this time, however, the DFEH has yet to develop the website training courses. In the interim period, the DFEH

is offering a sexual harassment and abusive conduct prevention toolkit online, which includes a sample of harassment and abusive conduct prevention training.

This toolkit may be obtained at dfeh.ca.gov/wp-content/uploads/sites/32/2018/12/SexualHarassmentandAbusiveConductPreventionTrainingToolkit.pdf.

Employers may use the toolkit, which includes a PowerPoint presentation, in conjunction with an eligible trainer to complete the sexual harassment and abusive conduct prevention training.

There likely will be a developing cottage industry of “trainers” providing webinars and online training tools for employers to purchase. It is anticipated that the DFEH webinar and online training will have an associated charge. As the training must be provided by the employer, it will be at the employer’s sole cost. The training must be part of the employees’ paid time.

Failure to Provide Training

What if the employer fails to provide such training? According to the statute, the DFEH may seek an order requiring employers to comply with the sexual harassment and abusive conduct training requirement. There are no punitive measures—such as fines or penalties—that may be assessed against a non-complying employer. For avoidance of any doubt, it should be clearly understood that providing the training does not immunize employers or bad actors from claims of sexual harassment. It could be used as evidence to demonstrate that an employer actively supported a culture free of sexual harassment in an effort to mitigate against an adverse claim. On the other hand, the failure to provide the sexual harassment and abusive conduct training could be used as evidence to argue that the employer supported a culture where sexual harassment and abusive conduct was tolerated.

Conclusion

Although the law and regulations are complex, the steps for compliance are relatively simple. An employer with more than five employees should provide sexual harassment and abusive conduct training to supervisors and non-supervisors prior to January

1, 2020. This is probably easiest done by paying for a trainer or purchasing a website-based product. The employer should keep attendance records and schedule additional training sessions in two years (2021). Employers should be mindful that new supervisors, whether hired from the outside or elevated to supervisor positions, must be trained in six months and integrated into the two-year training cycles. If these steps are followed, compliance should be achieved.

What lessons are to be learned from this new legal requirement? As a general premise, the best defense against employment claims is to provide a positive work culture. What constitutes a good place to work is constantly evolving. It is no longer just a place that treats employees like family, but is a place that respects the law and changing cultural expectations. It should be recognized that this new training requirement reflects an increased emphasis on providing California employees a workplace free of sexual harassment and abusive conduct. These laws are reflective of society’s growing intolerance with such conduct. Employers who are dismissive of the social attitudes and legal standards run the risk of liability. Those employers that embrace this new law and use the training to enhance their workplace culture may benefit as they are taking steps to create a good place to work.

For additional information, you may wish to visit the DFEH’s website: dfeh.ca.gov. ■



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